FILE COPY.

FILED.
NOV 7 1906
JAMES H. McKENNEY

Supreme Court of the United States

OCTOBER TERM 1906.

No. 446.
CORWIN D. BACHTEL, PLAINTIFF IN ERROR,
vs.
R. FRANK WILSON, SHERIFF OF STARK CO., OHIO.

No. 447.
CORWIN D. BACHTEL, PLAINTIFF IN ERROR,
vs.
R. FRANK WILSON, SHERIFF OF STARK CO., OHIO.

No. 448.
HARVEY H. MILLER, PLAINTIFF IN ERROR,
vs.
R. FRANK WILSON, SHERIFF OF STARK CO., OHIO.

No. 449.
WILLIAM L. DAVIS, PLAINTIFF IN ERROR,
vs.
R. FRANK WILSON, SHERIFF OF STARK CO., OHIO.

No. 450.
CHARLES H. VAN HORN, PLAINTIFF IN ERROR,
vs.
R. FRANK WILSON, SHERIFF OF STARK CO., OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR PLAINTIFFS IN ERROR.

(20411), (20412), (20413), (20414), (20415).

SYNOPSIS.

PAGE

Statement 6

Contention of plaintiffs in error in the State Courts 10

How the question was raised..... 11

Assignment of error..... 13

Argument 14

INTERPRETATION OF SECTION 30.

I. Could officers of banks other than those formed under act in question be indicted under section 30?..... 14

II. The rule of strict construction would apply in such supposed cases against officers of other banks..... 14

III. The section in question being an amendment merely, the meaning of the original section should first be settled 15

IV. Under the Ohio Constitution of 1802 special legislation was frequent... 16

V. The title of the original act must be considered in settling its meaning.. 16

VI. The intrinsic evidence of the original section 17

VII. The history of banking legislation in Ohio throws light upon the question 17

PAGE

VIII. Improbability of a criminal provision of general application being inserted in an act limited in point of time.. 19

IX. The meaning of the term "banking company" in original section must be given those words in the amended section 20

X. No reasons appear in the amendment for any change in the meaning of the words "banking company"..... 21

XI. The title of the amending act indicates no intention to enlarge the scope of section 30..... 23

XII. The intrinsic evidence of the amended section 24

XIII. The section under consideration must be read in connection with the other sections of the amending act.. 26

XIV. Section 27 of the original act is an interesting illustration of this point.. 27

XV. The amendatory act of 1879 and the amended section 30 disclose no purpose to enlarge the provisions of the original act or section..... 29

XVI. The term "banking company" as used in another section of the act has been read by the Supreme Court of Ohio as referring to banks organized under that act..... 29

PAGE

XVII. The accepted interpretation of the profession has excluded officers of all other banks 30

XVIII. The Supreme Court of Pennsylvania has inclined to a like construction of a similar section..... 31

XIX. Section 30 is not in the criminal code of the state..... 31

CONSTITUTIONAL QUESTION.

XX. Does the prosecution of plaintiffs in error under section 30 as amended in 1879 violate section 1 of the fourteenth amendment? 32

XXI. Our claims involve the consideration of the legislative power of classification 34

XXII. Decisions defining the clauses of the fourteenth amendment 34

XXIII. State decisions directly in point.... 36

XXIV. Has the legislature the power to place the officials and agents of the so-called free banks in a class by themselves? 38

XXV. The powers conferred by the two principal banking statutes 41

XXVI. Reasons for existence of two statutes for the incorporation of banks..... 47

XXVII. An illustration of gross inequality.. 50

PAGE

XXVIII. No special grounds for classification. 51

XXIX. The grant of corporate powers furnishes no ground for classification.. 52

XXX. Section 30 is not a mere police regulation 53

XXXI. The supposed classification was accidental 55

XXXII. If amended section 30 is declared unconstitutional is original section 30 revived? 56

XXXIII. As to the law of judicial notice..... 58

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 446.

CORWIN D. BACHTEL, PLAINTIFF IN ERROR,

vs.

R. FRANK WILSON, SHERIFF OF STARK CO., OHIO.

No. 447.

CORWIN D. BACHTEL, PLAINTIFF IN ERROR.

vs.

R. FRANK WILSON, SHERIFF OF STARK CO., OHIO.

No. 448.

HARVEY H. MILLER, PLAINTIFF IN ERROR,

vs.

R. FRANK WILSON, SHERIFF OF STARK CO., OHIO.

No. 449.

WILLIAM L. DAVIS, PLAINTIFF IN ERROR,

vs.

R. FRANK WILSON, SHERIFF OF STARK CO., OHIO.

No. 450.

CHARLES H. VAN HORN, PLAINTIFF IN ERROR.

vs.

R. FRANK WILSON, SHERIFF OF STARK CO., OHIO.

In Error to the Supreme Court of Ohio.

(20411), (20412), (20413), (20414), (20415).

NOTE. The five above entitled causes all depending upon one and the same question, the following brief is respectfully submitted as applicable to all the cases.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

The sole question sought to be raised in this Court is whether the following section of the statutes of Ohio contravenes section 1, fourteenth amendment of the Constitution of the United States.

Section 30 of the act of March 21, 1851, entitled "An act to authorize free banking," as amended April 24, 1879, (76 O. L. 74; R. S. Sec. 3821-85.)

"Every president, director, cashier, teller, clerk, or agent of any banking company, who shall embezzle, abstract, or wilfully misapply any of the moneys, funds, or credits of such company, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any notes, bonds, drafts, or bills of exchange, mortgage,

judgment or decree, or shall make any false entry in any book, report or statement of the company, with intent in either case to injure or defraud the company, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the company, or any agent appointed to inspect the affairs of any banking company in this state, shall be guilty of an offense, and, upon conviction thereof, shall be confined in the penitentiary, at hard labor, not less than one year, nor more then ten years."

The old state banking law of 1845, (2 Curwen, 1089,) having established the State Bank of Ohio and its branches as banks of issue, in 1851 the free banking act was passed authorizing banks of issue free from the control of the state bank, but limited in duration to the end of the year 1872, after which they were forbidden to transact business.

It contained a criminal section in substance the same as the section above quoted.

After banks formed under it had ceased to operate, by reason of the limitation in the act, and the motive for authorizing banks of issue having been removed by the federal tax on state bank issues, the act was amended on April 24, 1879, by cutting out all power to issue paper money and practically all reference to it, and the time limitation being also repealed, what remained authorized the incorporation of banks with powers to receive deposits, discount paper and buy and sell exchange. As appears by the statistics of the state published by authority of law, 57 banks were incorporated under the statute as thus amended,

of which some 34 were in business in 1905. The term "free banking" has no significance since the amendment of 1879, as it had relation solely to the issue of paper money.

On February 26, 1873, (70 O. L. 40) an act was passed in terms authorizing savings and loan associations, but with such broad powers as to authorize the carrying on of ordinary commercial banking. The published statistics show that under its provisions some 73 banks were formed before the year 1880, when the general incorporation laws of the state were revised on such broad lines as to authorize the incorporation of banks, (R. S. of Ohio, 1880, sec. 3235) the governing provisions of the act of 1873 being retained (R. S. 3797 and following). Under this general act, the statistics show 464 banks were formed of which some 330 were in existence in 1905.

The banking statistics of the state show that in addition to the banks incorporated under the two acts referred to, there are in the state some 300 banks owned by unincorporated stockholders, co-partnerships or individuals.

The Canton State Bank was incorporated under the so-called free banking act. The plaintiff in error, Bachtel was its cashier, Davis, its vice-president and a director, Van Horn, its teller, and Miller, a customer. In May Term, 1906, they were indicted in the Common Pleas Court of Stark County, under amended section 30 above quoted, upon various charges, Bachtel and Van Horn as principals, Davis and Miller as aiders and abettors. After filing demurrers which were overruled and before arraign-

ment the plaintiffs in error severally petitioned a judge of the State Circuit Court, (the intermediate appellate court, but with original jurisdiction in *habeas corpus*), for writs of *habeas corpus*, which were allowed and made returnable to the three members of the court, alleging that the section of law in question was unconstitutional and therefore the Court of Comman Pleas was without jurisdiction.

Upon return of the sheriff that the parties were in his custody under indictments based upon that act, they were admitted to bail to abide the order of the Circuit Court. Upon final hearing the Circuit Court judges dismissed the several applications and remanded the petitioners to the custody of the sheriff. Before this judgment was carried into effect the plaintiffs in error filed their several petitions in error in the State Supreme Court, applying for a suspension of the judment in the Circuit Court until final hearing in the Supreme Court, which was allowed.

Upon the final hearing in the Supreme Court the judgment of the Circuit Court was affirmed, without opinion or report. To reverse that judgment these writs of error are now prosecuted.

THE QUESTION RAISED IN CIRCUIT COURT.

The question presented before the circuit judges is this:

The officers, clerks and agents of all the banks in the state, (excluding National Banks) in their relations to their banks, their depositors, customers, the community and the state are a class of persons acting under the same conditions and circumstances.

The statute above quoted,

(a) by no possible interpretation includes the officers, clerks and agents of the unincorporated stock banks, of banks, copartnerships or of individuals;

(b) and by no proper interpretation, includes the officers, clerks and agents of banks existing under the general incorporation laws of the state;

(c) but said section 30 affects only the officers, clerks and agents of banks formed under the law of which it is a part.

CONTENTION OF PLAINTIFFS IN ERROR IN THE STATE COURTS.

Under either of the foregoing interpretations of the statute the imprisonment of an officer, clerk or agent in its enforcement is a deprivation of his liberty without due process of law, for the first element of due process of law is equality before the law: and that it does not affect equally all persons in the state acting under like conditions and circumstances.

Under that interpretation which brings within the section all officers and agents of incorporated com-

panies, those of the unincorporated joint stock banks, copartnership and private banks are exempt from its operation; under that interpretation which includes the officers, clerks and agents of banks formed under the act of which the section is a part, the officers, etc., of banks incorporated under the general incorporation law of the state, and the partnership and private banks are unaffected.

HOW THE FEDERAL QUESTION WAS RAISED..

It was first raised in the Court of Common Pleas by demurrer stated in the statutory form to which was attached a special notice as follows:

DEMURRER.

This defendant demurs to the said indictment because the facts stated therein do not constitute an offense punishable by the laws of this state.

NOTICE.

The State of Ohio will take notice that upon the hearing of this demurer Corwin D. Bachtel, the defendant herein will show that he was born in the United States and is now a resident of the State of Ohio; that he is subject to the jurisdiction of the United States and a citizen thereof and of the State of Ohio; that by the laws of the State of Ohio no indictment could have been found except under section 30 of an act entitled "An act to authorize Free Banking," passed March 21st, 1851, and amended April 24th, 1879. Defendant says that said act and law should not be enforced against him because it

abridges his privileges and immunities as a citizen of the United States. That by its enforcement against him it will deprive him of his liberty and property without due process of law and that said act denies him the equal protection of the laws. He says that said act affects but a small number and a very small proportion of the class of persons in the State of Ohio who are engaged in the employments designated in said act in the same manner and under the same conditions and circumstances as this defendant, and that said act is unequal and partial; and that said act contravenes article 14, section 1 of the amendments to the Constitution of the United States and is therefore void.

Upon the hearing of said demurrer this defendant will also insist that said act is void because it contravenes article 1, sections 1 and 2, and article 2, section 26 of the Constitution of Ohio. Said defendant will further contend that the facts stated in said indictment do not constitute an offense under the laws of Ohio.

No. 447, record pp. 16-17.)

Referring to Record in No. 446, on page 12 will be found the form of petition for writ of *habeas corpus* in which it is set out, referring to said section 30, "that said statute is in contravention of the 14th amendment of the constitution of the United States," also certain provisions of the state constitution.

The judgment of the Circuit Court, same Record, p. 60, was that "said Section of said Act * * * is not in contravention of the 14th Amendment of the Constitution of the United States, etc."

The question was raised in the petition in error to the State Supreme Court, Record p. 6, and is passed upon specifically in the judgment of the Supreme Court, Record pp. 8-9.

The entire contention of the plaintiffs in error is disclosed in the opinion of the circuit judges. (See Record in case No. 447, p. 24.)

ASSIGNMENT OF ERROR.

The assignment of error upon which the several writs of error are predicated are as follows:

"The Supreme Court of Ohio erred in holding and deciding that section 30 of an act of the General Assembly of the State of Ohio entitled "an act to authorize free banking," passed March 21, 1851, as amended April 24, 1879, (3821-85) Bates' Annotated Statutes of Ohio, was valid. The validity of said section was denied and drawn in question by the plaintiff in error on the ground that is was repugnant to the Constitution of the United States, and in contravention thereof.

"The said errors are more particularly set forth as follows:

"The Supreme Court of Ohio erred in holding and deciding that the privileges and immunities of the plaintiff in error as a citizen of the United States were not abridged, and that he was not deprived of his liberty and property by the State of Ohio without due process of law nor denied the equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States by

being arrested and ~~protected~~ prosecuted under an indictment found and returned solely under favor of section 30 of the above recited acts." (Record in No. 446, pp 1-2.)

ARGUMENT.

THE FIRST QUESTION OF IMPORTACE IS, THE INTERPRETATION OF THE STATUTE IN QUESTION: THE 30TH SECTION OF THE ACT OF 1851 AS AMENDED IN 1879.

I.

COULD OFFICERS OF BANKS OTHER THAN THOSE FORMED UNDER THE ACT IN QUESTION BE INDICTED UNDER SECTION 30?

Obviously this will test the interpretation of the statute. As it would be interpreted against the officers of another bank, for example one formed under the general incorporation laws of the state or a copartnership bank, so it must be interpreted here. It cannot be read one way in one case, and another way in another case.

II.

THE RULE OF STRICT CONSTRUCTION WOULD APPLY IN SUCH SUPPOSED CASES.

Penal statutes must be strictly constructed.

United States v. Wiltberger, 5 Wheaton 75. Chief Justice Marshal on page 95 says:

"The rule that penal laws are to be constructed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the

legislative, not in the judicial department. It is the legislature, not the court, which is to define the crime, and ordain its punishment."

On p. 96, "It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of the statute, is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of kindred character, with those which are enumerated."

"If this principle has ever been recognized in expounding criminal law it has been in cases of considerable irritation which it would be unsafe to consider as precedents forming a general rule for other cases."

It must not be urged that the officers of other banks are within the reason of this enactment, and that, therefore, it should be construed to include them. The supposed general intention of the legislature can not be permitted to extend the scope of the section beyond its language properly interpreted according to the well settled rules of interpretation adopted by the Courts.

United States v. Harris, 177 U. S. 305.

III.

THE SECTION IN QUESTION, BEING AN AMENDMENT MERELY THE MEANING OF THE ORIGINAL SECTION SHOULD FIRST BE SETTLED.

We cite Black on Interpretation of Laws, Sec. 130, p. 356.

"For the same reason, of two constructions, either of which is warranted by the words of an amendatory act, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended."

IV.

UNDER THE OHIO CONSTITUTION OF 1802 SPECIAL LEGISLATION WAS FREQUENT.

The act of March 21, 1851, was passed before the adoption of the constitution of 1851. Under the old constitution special legislation, even in criminal matters, was frequent and upheld. It is not surprising to find it in the statute in question.

Albyer v. State, 10 O. S. 588.

V.

THE TITLE OF THE ORIGINAL ACT MUST BE CONSIDERED IN SETTLING ITS MEANING, — "AN ACT TO AUTHORIZE FREE BANKING."

This excludes any intention to enact a general crimes act embracing officers or employes of other corporations, or to deal with the officers of any other banks incorporated or unincorporated.

The rule in Ohio is well settled.

Steamboat Monarch v. Finley, 10 O. R. 384, p. 387:

"Although the title to a statute constitutes no part of the law, yet it may well be considered in its constructon as furnishing an index by which doubtful matters in the body of the statutes may be settled."

Harris v. State, 57 O. S. 92, referring to titles to chapters of the crimes act:

"These titles are part of the statute, and are to be considered in arriving at the intent of the legislature."

Burgunder v. Weil, 60 O. S. 234.

In this case the construction of the act is made largely to be dependent upno the title.

Bates v. Nelson, 49 Mich. 459-60.

"The operation of a statute cannot go beyond the purpose expressed in the title."

VI.

THE INTRINSIC EVIDENCE OF THE ORIGINAL SECTION.

The language of original section 30 shows clearly that the term "any banking company" embraced only banks under that act. See copy of original section on page 21. The words in italics, referring to circulating notes limits the whole section to banks under that act. It was referring to banks of issue and limited the reference to banks whose notes were delivered to them by the Auditor of State "as provided by this act."

VII.

THE HISTORY OF BANKING LEGISLATION IN OHIO THROWS LIGHT UPON THE QUESTION.

It is a notable fact that the state banking act of 1845, (2 Curwen, 1089), contained a criminal provision just like the original section 30 of the act of

1851; in fact the latter is a precise copy of the former. If original section 30 under consideration embraced all banks in the state, then the act of 1845 did the same, and there would be two acts covering precisely the same ground, and the second act was useless. If each related to the banks founded under those acts respectively there was a purpose in each.

But that is not all. In 1857 the legislature passed a law authorizing a new system of banks of issue, without repealing the old laws or affecting the banks existing under either. In it was incorporated a substantial copy of the criminal section found in the former acts. Had that act received the approval of the popular vote required by the constitution of 1851 we would have had three criminal sections all applying to all the banks of the state, unless as we contend each act referred to its own banks.

But again, the referendum vote having defeated the law of 1857, in 1877 (74 O. L. 117, sec 22), the legislature passed an act for a system of banks without powers of issue, along the lines of the act of 1851 as amended two years later in 1879, and inserted in it a similar criminal section but with different penalty, so again, there would be three different criminal laws covering precisely the same ground, if as contended these sections embrace all banks in the state, at least so far as legislative intent was expressed, but that law, too, was defeated by the people to whom it was referred through a mistaken view of the state constitution on the subject of banks.

To complete this historical sketch; — when the legislature amended section 30 in 1879 as quoted, if

the original section of 1851 included all banks in Ohio, then must the section of 1845 do the like, and when the amendment of 1879 came into being there were two sections in different laws, both in force from 1879 to 1894 when the act of 1845 was repealed, (91 O. L. 396), both of which it must be claimed by our adversaries covered the officers of all banks in the state, *with conflicting punishments,* for the act of 1845 prescribed not less than *five years* imprisonment and the act of 1879 a minimum of *one year.* The only interpretation that will harmonize this conflict is to read these various criminal sections in different laws as confined to the officials of the banks formed under the respective acts.

The persistence of the legislature in this plan indicates a "habit" which doubtless originated in the old time practice of incorporating banks by special acts.

VIII.

IMPROBABILITY OF A CRIMINAL PROVISION OF GENERAL APPLICATION BEING INSERTED IN AN ACT LIMITED IN POINT OF TIME.

By section 10 of the original free banking act, (2 Curwen, p. 1611), each corporation formed under it was created "a body politic and corporate with succession, until the year 1872, and thereafter until the repeal of this act," and section 42 provided, "that nothing in this act contained shall be construed so as to authorize a continuance of banking business under this act, after the year 1872."

The legislature was evidently dealing with a temporary matter. How improbable that by section 30 of the same act it was intending to enact a general criminal law applicable to the officers of banks that might come into being under acts long after the act of 1851 would lose its force and be forgotten. In fact this same free banking act of 1851 was printed as "obsolete" in Swan & Critchfield's edition of the statutes at large of the state in the year 1870. (See page 168 of that edition.)

IX.

THE MEANING OF THE TERM "BANKING COMPANY" IN ORIGINAL SECTION 30 BEING ASCERTAINED, THE SAME MEANING SHOULD BE GIVEN THOSE WORDS IN THE AMENDED SECTION.

This general rule is fully recognized in Ohio.

Williams v. State, 35 O. S. 175.

In this case it is held that a change in the definition of the crime of manslaughter, and also in the provisions of the code of criminal procedure as to the form of indictment for that offense, did not effect a change in either the law or the practice, for the Court say:

"We see in this change of language no purpose to change the law in any particular."

State v. Commissioners of Shelby County, 36 O. S. 326.

Syllabus 1. "Where an act of the legislature, or several acts *in pari materia*, have undergone revision,

the same construction will prevail as before revision, unless the language of the act plainly requires a change of construction, to conform to the manifest intent of the legislature."

Boynton, J., p. 330:

"Neither an alteration in phraseology nor the omission or addition of words in the latter statute necessarily require a change of construction. The intent to give to the new act a different effect from the old, should be clearly manifested."

The rule is followed in City of Warren v. Davis, 43 O. S. 447.

X.

NO REASONS APPEAR IN THE AMENDMENT FOR ANY CHANGE IN THE MEANING OF THE WORDS "BANKING COMPANY."

The original and amended sections are as follows:

Original sec. 30, (49 O. L. 41. 2 Curwen, p. 1609.)	Sec. 30 as amended April 24, 1879, (76 O. L. 74. R. S. Sec. 3821-85.)
Every President, Director, Cashier, Teller, Clerk or Agent, of any banking company, who shall embezzle, abstract, or willfully misapply any of the moneys, funds or credits of such company, or shall, without authority from the directors, issue	Every president, director, cashier, teller, clerk or agent, of any banking company, who shall embezzle, abstract, or willfully misapply any of the moneys, funds or credits of such company, or shall, without authority from the directors,

or put in circulation any of the notes of such company, or shall put in circulation any bills or notes purporting to be the circulating bills or notes of such bank, other than those delivered to such bank by the Auditor of State, as provided for by this act, either with or without the authority of the directors, or shall, without such authority, issue or put forth any certfiicate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment, or decree, or shall manke any false entry on any book, report or statement of the company with an intent in either case to injure or defraud such company, or *to injure or defraud* any other company, body corporate or politic, or any individual person, or to deceive any officer or agent appointed to inspect the affairs of any banking company in the State, shall be guilty of a *misdemean-*

issue or put forth any certfiicate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment, or decree, or shall make any false entry on any book, report or statement of the company with an intent in either case to injure or defraud the company, or any other company, body politic or corporate, or any individual person, or to deceive any officer *of the company*, or any agent appointed to inspect the affairs of any banking company in this State shall be guilty of an *offense*,

or, and upon conviction thereof, shall be confined in the penitentiary at hard labor, not less than *five* nor more than ten years.	and, upon conviction thereof, shall be confined in the penitentiary, at hard labor, not less than *one year*, nor more than ten years.

The only changes in the amendment are the omission of the provisions relating to circulation which were no longer necessary as the power to issue circulation was repealed in the amending act, the change of the minimum term of punishment from five years to one year, and substitution of the word "offense" for "misedemeanor". None of these alterations imply any intent to change the meaning of the words "banking companies."

XI.

THE TITLE OF THE AMENDING ACT INDICATES NO INTENTION TO ENLARGE THE SCOPE OF SECTION 30.

The title of the act of 1879 is "an act further to amend an act entitled 'an act to authorize free banking,' passed March 21, 1851, (49 Ohio Laws 41) and the acts amendatory and supplementary thereto." (76 O. L. 72.)

The Circuit Court considered this a decisive point.

"Now, as determining whether the phrase in the amended Section 30, 'any banking company,' applies to all banking companies of the state, or only banking companies organized under the free banking act, it is only necessary to refer to the title of this act en-

titled 'An act to authorize free banking, passed March 21, 1851, (49 Ohio Laws, 41), and the acts amendatory and supplementary thereto.' So that the conclusion to our minds is irresistible, that the legislature at this time had not in contemplation any other kind or character of a banking institution except those contemplated in the act of March 21, 1851, and that nothing contained in this amendatory act was intended by the legislature, or by any fair construction thereof could be *hold or* include any other bank, except the class provided for in the original act, including those in existence, or any that might come into existence under the provisions thereof, during the time that said act remain — the law of Ohio." (See record in No. 447, p. 26.)

XII.

THE INTRINSIC EVIDENCE OF THE AMENDED SECTION.

When this amendment was made, the general incorporation laws of the state did not authorize the incorporation of banks. (Vol. 1. Swan & Critchfield's Statutes, p. 266 and following.) Each class of corporations had a law for itself. That authority was granted by section 3235 of the revision of 1880, the year after the amendment of the free banking act. (Revised Statutes of Ohio, Edition of 1880, section 3235.)

There was in force, however, a statute of February 26, 1873, authorizing the incorporation of savings and loan associations, (70 Ohio Laws 41) which

was the only act in the nature of a banking law upon the statute books except the act of 1851 in question and the old state bank act. The provisions of this act of 1873, so far as they related to the powers and government of those banks were embodied in the Revised Statutes of 1880 (section 3797 and following), and after 1880 such banks were obliged to incorporate under the general incorporation chapter of the Revised Statutes, section 3235.

It follows that if amended section 30 of 1879 was intended to include "banking companies" other than those formed under the particular act of which section 30 was a part, it must have referred to institutions formed under the savings and loan act of 1873, or the liquidating branches of the old state bank then taxed out of active existence, but whose liquidating officers were still covered by the criminal section of their own original act of 1845.

But it seems incredible that the legislature would have used the term "banking company" to embrace institutions named by statute "associations."

The amended section 30 includes "director" and "cashier." The savings and loan act used neither word; the members of the governing body were called "trustees" and the active executive officer, "treasurer."

XIII.

THE SECTION UNDER CONSIDERATION MUST BE READ IN CONNECTION WITH THE OTHER SECTIONS OF THE AMENDING ACT.

Black on Interpretation of Laws, p. 166.

"In the construction of a statute, in order to determine the true intention of the legislature, the particular clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts."

This rule is fully recognized in Ohio.

Rhodes v. Weldy, 46 O. S. 234.

"Where the same word or phrase is used more than once in the same act in relation to the same subject-matter and looking to the same general purpose, if in one connection its meaning is clear and in another it is otherwise doubtful or obscure, it is in the latter case to receive the same construction as in the former, unless there is something in the connection in which it is employed, plainly calling for a different construction."

Ohio v. Blake, 2 O. S. 147, see p. 151.

"It is a settled rule of construction that the intention of the law maker is to be deduced from a view of the whole and every part of the enactment taken and compared together."

This rule was applied to a statute very similar in its terms to the section in hand.

See Coble v. Farmers' Bank, 63 O. S. 528.

In one section of the act the term "banking partnership" was limited to banking partnerships whose capital was represented by shares or certificates of stock. In another, the term was used without that limitation. It was held that the same meaning should be attached to the term in both sections.

The term "any banking company" is used in almost every one of the 47 sections of the act of 1851 and in the amending act of 1879, and wherever used it refers to banks organized under the act. In many of the sections express reference is made to the act, in others it is plainly implied.

In the original act the reference is express in sections 3, 4, 5, 7, 8, 9, 10, 14, 16, 17, 18, 20, 24, 25, 29, 30, (being the section in question), 31, 32, 34, 35, 37, 38, 39, 43, and 44: the term is used in the following sections without express reference to companies organized under the act, but the intention is as clear as though the reference in each instance were made: sections 2, 11, 12, 13, 15, 19, 21, 22, 23, 26, 27, 28, 33, 36, 40, 41, 42, 45 and 46.

XIV.

SECTION 27 OF THE ORIGINAL ACT IS AN INTERESTING ILLUSTRATION OF THIS POINT.

"Sec. 27. All notes, bills, and other evidences of debt, excepting bills of exchange, discounted by

any banking company, shall be made, by the terms thereof, or by special indorsement, payable solely to such company; and no such evidence of debt shall be assignable except for collection, or for the following purposes: First — To pay and redeem the circulating notes of such company; Second — To pay other liabilities of the said company, and after such liabilities shall have been discharged; Third — To divide among the shareholders on their stock." (49 v. 41) (3821-82) Annotated Statutes of Ohio.

This section was not repealed in 1879 and stands as a part of the act of 1851 amended.

It is pertinent to inquire what interpretation the words "banking company" are to receive in this section. If it is to be held to include all savings banks, trust companies, copartnership banks and private bankers, then under the ruling of the Supreme Court in Vanata v. Bank, 9 O. S. 27, all the notes discounted by all of these institutions must be considered null and void, for it is safe to say that not one of them discounts non-negotiable paper. That ruling was upon a precisely similar provision in the state bank act in 1845, but will apply equally to section 27, thus leaving all the banks in the state to their action for money had and received against actual borrowers, but destroying all rights against sureties, third parties, and upon mortgage or other securities. Would such an interpretation be accepted?

It will be observed that the term "any banking company" is used in this section without reference to those formed under the act, and in that respect is the same as section 30 of the amended section, but quite

differently as to the original section in which express reference is made to companies formed under the act.

XV.

THE AMENDATORY ACT OF 1879 AND THE AMENDED SECTION 30 DISCLOSE NO PURPOSE TO ENLARGE THE PROVISIONS OF THE ORIGINAL ACT OR SECTION.

The sole purpose of the amending act was to eliminate provisions,— to strike out everything that related to bank circulation. Not a single new feature was added to the law. It is highly improbable that with such a purpose in mind the legislature should contemplate an extension of the sole criminal provision of the statute. If so, it certainly owed it to the people of the state to express this purpose in unmistakable language.

XVI.

THE TERM "BANKING COMPANY" AS USED IN ANOTHER SECTION OF THE ACT HAS BEEN READ BY THE SUPREME COURT OF OHIO AS REFERRNING TO BANKS ORGANIZED UNDER THAT ACT.

In Franklin Bank v. Commercial Bank, 36 O. S. 350, the construction of section 12 of the act was involved. The section 12 referred to used the words "company" and "banking company" in the same unrestricted form as in section 30, but (on p. 354) the court speaks of those words as meaning banks organized under that act.

XVII.

THE ACCEPTED INTERPRETATION OF THE PROFESSION AND CERTAINLY OF PROSECUTING ATTORNEYS THROUGHOUT THE STATE HAS EXCLUDED OFFICERS OF ALL OTHER BANKS FROM THE SCOPE OF THIS CRIMINAL SECTION.

This is apparent from the fact that though this act has been upon the statute books of the state for over fifty years, no prosecutions have been attempted under it, so far as is known, before those against the plaintiffs in error. Not a single case is found in the reports. Many indictments have been found against officers and agents of other incorporated and unincorporated banks, but always under other criminal statutes.

In the case of State v. Kusnick, 45 O. S. 535, the cashier of an unincorporated bank was indicted under the general embezzlement act. Evidently the prosecuting authority assumed his case did not fall within section 30. The defendant was acquitted upon a point that could not have been suggested under section 30.

A case of great and general notoriety in the adjoining county, (Ohio v. Wagoner) shows the same official interpretation of the act, for indictment was found under the perjury act, the defendant being the official of a savings bank under the general incorporation law. Two juries disagreed upon the question whether the defendant had sworn to an official report as certified by a notary public. Could he have

been prosecuted under section 30, it would have been sufficient to have proven a false entry in the report without an oath. But that was not done.

XVIII.

THE SUPREME COURT OF PENNSYLVANIA HAS INCLINED TO A LIKE CONSTRUCTION OF A SIMILAR SECTION.

Pennsylvania in 1861 adopted in substance the free banking law of Ohio, with a criminal section like section 30. In Com. v. Ketner,, 92 Pa. State 372, it appears the cashier of a national bank was indicted under that law, and in the opinion, Paxson, J. (p. 376) says:

"It was urged, however, *with much force*, that the act of 1861 was only intended to apply to banks organized under the free banking law of which it forms a part;"

But the case was decided upon the point that Congress having established the national banks their officers were amenable to section 5209 of that law and not the state law.

XIX.

SECTION 30 IS NOT IN THE CRIMINAL CODE OF THE STATE.

On January 1, 1880, the revised statutes of Ohio went into effect, the work of a codifying commission appointed some years before to condense and ar-

range the statutes at large. As a part of this work the commission revised the criminal statutes of the state, and those of general application were placed in a title by themselves, being Title 1 of Part 4. Many sections theretofore of limited and special application were given a broad application and placed in this title under appropriate classifications. Section 30 which was amended the year that report was made was not so placed. On the contrary the commission in its report stated that the entire free banking act as just amended was not included in the revision, but was placed in an appendix to the Revised Statutes. See 2 R. S. of Ohio, 1880, p. 1823, published under direction of the Commission by authority of the legislature.

We submit that this is strong evidence that neither the commission nor the legislature supposed this statute affected other banks, incorporated or unincorporated.

THE CONSTITUTIONAL QUESTION.

XX.

DOES THE PROSECUTION OF PLAINTIFFS IN ERROR UNDER SECTION 30 AS AMENDED IN 1879 VIOLATE SECTION 1 OF THE FOURTEENTH AMENDMENT?

Constitution of the United States.

Fourteenth Amendment, Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No state shall *make or enforce any law* which shall abridge the privileges or immunities of citizens of the United States; nor shall any State *deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"

In view of the disputed meaning of section 30, we submit the following alternative claims:

(a) If the Court hold with us that that section includes only the officials and agents of the so-called free banks, we claim this statute and these prosecutions deprive the plaintiffs in error of their liberty *without due process of law*, and *deny to them the equal protection of the laws*, because the statute is enforcible against a part, and a very small part, of a class of persons all of whom act under similar conditions and circumstances; and that thereby the officials and agents of less than thirty-four banks are attempted to be placed in a class by themselves, for the purposes of this criminal legislation, separate and apart from the officials and agents of other incorporated banks and of all unincorporated banks.

(b) If the Court holds that section 30 includes the officials and agents of all incorporated banks, but excludes those of unicorporated private banks, the same discrimination is presented in principle, and the same result should follow.

XXI.

OUR CLAIMS INVOLVE THE CONSIDERATION OF THE LEGISLATIVE POWER OF CLASSIFICATION.

We have set forth on page 8 of this brief some numbers, derived from state statistical sources, of banks organized under the two principal banking acts, and also those of unincorporated banks. We do not consider these numbers of any importance. In fact they are constantly changing. The material facts upon which we rely are that the Canton State Bank was organized under the amended free banking act as shown by the indictments; we admit that some *others* were so organized; it is a matter of general knowledge in the state and will not be denied that in 1879 banks existed under the act of February 26, 1873, authorizing savings and loan associations, and that others were formed thereafter and some now exist, and that throughout this period unincorporated banks existed and now exist.

XXII.

WE REFER TO THE FOLLOWING CASES DEFINING THE CLAUSES OF THE FOURTEENTH AMENDMENT UPON WHICH WE RELY.

Caldwell v. State of Texas, 137 U. S. 692, Chief Justice Fuller, page 697,

"No state can deprive particular persons or classes of equal and impartial justice under the

law. That due process of law (under the 14th amendment) is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice." On p. 698, "The powers of the state must be exercised within the limits of these principles, and its exercise cannot be sustained when special, partial and arbitrary."

Railroad Company v. Matthews, 174 U. S. 96, Justice Brewer on page 104, says:—

"On the other hand it is also true that the equal protection guaranteed by the constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment should be for double damages or subject to an attorney fee in favor of the plaintiff, when no other individual or corporation is subject to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."

In this case the statute was sustained because it affected all the railroads in the state.

Railway Company v. Ellis, 165 U. S. 150. "A state statute imposing an attorney's fee not to exceed ten dollars in addition to the costs, upon railway corporations omitting to pay certain claims within a certain time after presentation, which applies to no other corporation or individuals, is unconstitutional as denying to them the equal protection of the laws."

Giozza v. Tierman, 148 U. S. 655.

"8. Due process of law within the meaning of the 14th Amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

"9. When a state statute affects all persons engaged in the sale of intoxicating in exactly the same maner and degree, it is not in violation of the Constitution of the United States."

XXIII.

STATE DECISIONS DIRECTLY IN POINT.

Budd v. State, 3 Humphries, (Tenn.,) 483.

"A statute declaring that if certain officers of the Union bank embezzle, misappropriate funds, or make false entries, it shall be a felony, is in violation of the clause of the constitution declaring that 'no man shall be disseized or imprisoned, etc., but by the judgment of his peers or the law of the land,' but *aliter* if it extended to the same officers of all banks within the state."

We respectfully ask the Court to examine this case, as it is directly in point.

A case wherein it appears that the officers and employes of thirty-four banks fall within the operation of section 30, out of several hundred that are not within its provisions cannot be distinguished from the case in Tennessee, where one bank alone was brought within the provisions of a similar act.

Carter Bros. v. Coleman, 84 Ala., 256, Youngblood v. Trust & Savings Company, 95 Ala., 521.

In the first of these cases a statute of the state of Alabama made it a penal offense for any private banker to charge more than a certain rate for discounting commercial paper. That act was declared unconstitutional because it embraced only certain members of a class. But in the second case an amended act which included incorporated banks as well as private bankers was sustained, the latter act was justified although it was restricted to those engaged in the business of banking, on the ground that in the matter of discounting paper they constituted a "class in and of themselves." "The opportunities and temptations of persons engaged in it, to evade or violate laws against usury are so much greater and more frequent than those of persons not so engaged as to raise up a necessity for the application of more stringent measures and restrictions than are necessary in respect of other businesses and persons engaged therein. And it is this consideration which differentiates the business of banking from all others in respect to usury, and furnishes a predicate for such legislation as is contemplated

in section 4140 for the regulation of banking and bankers which does not exist as to any other occupations; just as the inherent dangers involved in the operation of a railroad differentiates that from all occupations, and necessitates legislation which would be entirely unnecessary and innocuous in respect to the business of farming, for instance."

XXIV.

HAS THE LEGISLATURE THE POWER TO TREAT THE OFFICIALS AND AGENTS OF THE SO-CALLED FREE BANKS AS A CLASS BY THEMSELVES?

The following propositions are well settled.

(a) The legislature cannot create a class where none naturally exists;

(b) Nor by artificially carving a class out of a larger one;

(c) Nor when classification is unnatural, unnecessary, arbitrary, fictitious or mistaken;

(d) Nor unless the classification is based upon matters which have relation to the object sought to be accomplished;

(e) Nor when the classification results in inequality before the law.

(f) The fiat of the legislature is not conclusive; the courts have the final decision.

Railway Company v. Ellis, 165 U. S., 150.

"Classification to relieve a law from the charge of a denial of equal protection cannot be made

arbitrarily, but must be based upon some difference which bears a just and proper relation to the attempted slassification."

Railroad Company v. Mathews, 147 U. S., 96 on page 104.

"Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonale and arbitrary, if the discrimination is based upon matters which have no relation to the objects sought to be accomplished, the same conclusion of unconstitutionality is affirmed."

Connolley v. Union Sewer Pipe Company, 184 U. S., 539.

5. "A discrimination in favor of agricultural products or live stock in the hands of the producer or raiser, made by the Illinois trust act of June 20, 1893 exempting them from the provisions which prohibit the recovery of the price of articles sold by any trust or combination formed in restraint of trade or competition in violation of that act, renders the act repugnant to the provisions of the Constitution, 14th amendment, in respect to equal protection of the laws."

Justice Harlan, page 560, says: —"The difficulty is not met with by saying that 'generally speaking, the state, when making laws may, in its discretion, make a classification of persons, firms, or corpora-

tions, and associations, in order to subserve public ojects. For this court has held that classification must always rest upon some difference which bears reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily without any such basis. *But arbitrary selection can never be justified by calling it a classification.* The equal protection demanded by the 14th amendment forbids this. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

Again, on page 564: "We conclude this part of the discussion by saying that *to declare that some of the classes engaged in domestic trade or commerce, shall be deemed CRIMINALS if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class should not be bound to regard those regulations*, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

Under the principles established by this court the power of classification does not exist unless it appears that the conditions and circumstances under which the plaintiffs in error were called upon to act

were so different from those under which other bank officials and agents were called upon to act as to justify classifying them by themselves.

What conceivable difference is there? Many of the banks under the savings and loan act carry on strictly commercial banking. The list of over 500 found in Record No. 446, p. 69, of banks under the savings and loan act show that the names of many of them give no indication of being savings banks. On the other hand, the Canton State Bank named in the indictments had a savings department.

We proceed to show the powers in fact conferred upon banks by the two principal banking laws found upon the statute books.

XXV.

THE POWERS CONFERRED BY THE TWO PRICINPAL BANKING STATUTES.

The savings and loan banks, so-called, derive their powers from the act of February 26, 1873, vol. 2, sections 3797 to 3811 excluding 3806a and 3806b, the following sections in that chapter coming from other laws relating to other matters. Since 1880 the incorporation of these institutions must be effected under the general incorporation laws of the state, section 3235 (vol. 2 Annotated Stat. p. 1836), the essential part of which is as follows.

"Sec. 3235. (For what purpose corporations may be formed.) Corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves, except for carrying on professional business;" * *

The act of 1851 for organizing free banks, as amended in 1879, will be found in vol. 2, Annotated stat., p. 2116. (3821-64 and following.)

Banks under both acts are formed by certificate of incorporation, in one case filled with the secretary of state, in the other with the county recorder and a copy filed with the secretary of state.

The essential powers conferred in these laws will be found in the following sections.

(a) In savings and loan law.

"Sec. 3804. (Interest may be paid on deposits.) Such corporations may receive on deposit, for safekeeping or investment, all sums of money that may be offered for that purpose by tradesmen, clerks, mechanice, laborers, minors, or other persons, or by any religious or charitable society, or municipal corporation, or that may be ordered to be deposited by any court in this state having custody of money, and make investments thereof in the manner provided in this chapter, and may credit and pay such rates of interest thereon as may be agreed upon, not exceeding the rate allowed by law; and they may *purchase and sell promissory notes, drafts, and bills of exchange* at such rate as may be agreed upon, and *transact such other business as properly pertains* to the *business of such associations not forbidden by the constitution and laws of this state.*"

"Sec. 3806. (Savings banks: investment of funds; discounts; interest; exchange; prohibiting advertisement of capital not paid in.) Such corporations may invest their funds in the purchase of stocks, bonds or other evidences of indebtedness of

the United States, stocks and bonds of the state of Ohio, bonds of any municipal corporation of this state, or school bonds of any municipal corporation, special school district or body politic in this state, issued pursuant to law, or in bonds issued by county commissioners within this state in pursuance of law, to such an amount as may be deemed proper, or the stocks or bonds of any state of the United States that has, for five years imediately preceding such investment, paid the interest on its bonded debt in lawful money of the United States, to the extent of ten per cent. of their paid in capital and deposits, or in bonds or notes secured by mortgages on unincumbered real estate situated in the county where the association is located, or any adjoining county in this state, worth, exclusive of buildings, at least double the amount loaned thereon, unless accompanied with valid insurance upon the buildings thereon that will make the value of the real estate and insurance at least double the amount loaned thereon; but not more than seventy-five per centum of the amount of the paid in capital and deposits of any such association shall at any time be invested in such real estate securities. Such associations may *discount notes and bills of exchange, and may take receive, reserve and charge upon any loan or discount made upon any note, mill of exchange or other evidence of debt, interest at the rate allowed by law.* Such interest may be reserved or taken in advance, at the time of making the loans or discounts; and for *interest taken directly or indirectly in excess thereof,* the *association shall be subject to the same penalty as natural*

persons; but in the purchase, discount or sale of a bill of exchange, payable at another place than the place of such purchase, discount or sale, the current rate of discount or premium may be charged and received in addition thereto. And no such corporation shall advertise by newspaper or letter-head or in any other way a larger capital stock than has been actually paid in."

"Sec. 3807. (Limit of loan to one person.) The total liabilities of any person, company, corporation, or firm, to any such association, either as principal debtor, or as security or indorser for others, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-fifth part of the capital stock of such association actually paid in; but the discount of bills of exchange drawn against actually existing values, and the discount of commercial or business paper actually owned by the person, company, corporation, or firm negotiating the same, shall not be considered as money borrowed."

"Sec. 3803. (What real estate it may acquire.) Such corporation may acquire, hold, and convey only such real estate as is necessary and convenient for the transaction of its business, and such as it may find necessary to purchase, at judicial sale or otherwise, to secure debts due it; but it shall not hold any real estate purchased to secure debts due it for a longer period than five years; and in all cases of loans upon real estate the expense of searches, examination of certificates, and recording of papers, shall be paid by the borrower."

(b) In the amended free banking act.

"(3821-69) Sec. 10. Powers of the company.) * * * and by its name shall have power to contract, and to prosecute and defend suits and actions of every description, as fully as natural persons; to *loan money, buy, sell, and discount bills of exchange, notes and all other written evidences of debt*, except such as may be herein prohibited; *to receive deposits, buy and sell gold and silver coin and bullion, collect and pay over money, and transact all other business properly appertaining to banking*, subject to the provisions and restrictions of this act; may acquire, hold and convey such real estate as may be necessary to the convenient transaction of its business, and no more; but may, however, acquire title to any real estate pledged to secure any debt previously contracted or purchased on an execution or order of sale, to satisfy any judgment or decree in its favor, or which shall have been conveyed to it in payment of any previous debt; but shall not hold any real estate so acquired, longer than is necessary to avoid a loss of any part of the debt, interest, and costs for the collection or security of which it was acquired; but at any time before selling the same, upon being tendered by the last preceding owner, or his legal representative, such sum as shall be necessary to save such company from loss of any part of the debt, interest, taxes, costs, and other necessary charges for the collection or security of which said real estate was acquired, such company shall release to such owner, his legal representative or assigns, all its right, title, and interest therein.

"(3821-80) Sec. 25. (Liabilities specified; proviso.) The total liabilities of any person, company,

corporation, or firm, for money borrowed, including the liabilities of the several members thereof to any banking company herein authorized, shall at no time exceed one-tenth part of the amount of the capital stock of such company actually paid in: provided, that the discount of bona fide bills of exchange drawn against actually existing values, and the discount of commercial or business paper actually owned by the person or persons, corporation or firm negotiating the same, shall not be considered money borrowed."

Two things must be observed in these laws; the powers granted are in substance the same; and *neither grants any powers not possessed by natural persons dealing singly or in unincorporated companies and copartnerships.*

They are in substance simply means to secure corporate existence. In Ohio the receiving of deposits, discounting paper and dealing in exchange is not a franchise. In these acts the common law right to do this kind of banking is not conferred but is somewhat abridged.

That the savings and loan act authorized the exercises of all "banking powers" other than the power to issue circulating notes was decided in Dearborn v. Bank, 42 O. S. 617.

XXVI.

WHY ARE THERE TWO STATUTES FOR THE INCORPORATION OF BANKS IN OHIO, IF THERE ARE NO SUBSTANTIAL DIFFERENCES IN THEIR ESSENTIAL PROVISIONS?

The banking statutes of the state present an instructive history that throws light on this question.

Before the constitution of 1851 the incorporated banks were banks of issue organized under general or special laws. There were no incorporated commercial banks without the power to issue paper money. There were a few "savings societies" upon the plan of the New England savings banks, without stockholders, managed by trustees.

The constitution of 1851 adopted a new rule as to banks.

Article XIII, section 7. "No act of the General Assembly, authorizing associations with banking powers, shall take effect until it shall be submitted to the people, at the general election next succeeding the passage thereof, and be approved by a majority of all the electors, voting at such election."

In 1857 a new bank law authorizing banks of issue was passed but the people defeated it.

The war tax of 1866 foreclosed further interest in banks of issue, but the natural desire to secure corporate perpetuity for copartnership banks led to further legislation. But this new constitutional provision raised serious doubts as to the power of the legislature to authorize banks of any kind without

popular approval. The first effort was the law of 1867 (64 O. L. 184), for the formation of savings societies. This covered the ground as to savings banks pure and simple but it did not meet the business demand. The next step was the act of 1873, (70 O. L. 40), authorizing banks with full powers of deposit, discount and exchange, but with a gloss of the savings bank thrown over them. Some sixty odd banks were formed under this, some pursuing savings bank methods and others the methods of commercial banking, until 1877, when the doubt as to their constitutionality led to another appeal to the people by the pasage of an act like the old free banking act of 1851 with the paper money provisions omitted, and named after it, an act to authorize free banking, (74 O. L. 117), and submitted that to the people, but it was defeated.

Another expedient was resorted to. The old act of 1851 was taken in hand because it was enacted before the adoption of the new constitution, and the Supreme Court of the state had decided that it had not been abrogated by the constitution. It was easy to strike out the provisions for a circulation and what remained would authorize banks substantially like those authorized by the savings and loan act, but avoiding the annoying uncertainty of constitutionality that clung to that statute, the question about that time having been raised in the lower courts. But one difficulty was encountered. Section 10 of the act of 1851 declared that every bank formed under it as hereinbefore shown "was created a body politic and corporate, with succession

until the year 1872, and thereafter, until the repeal of this act." Clearly this contemplated that all companies formed under it should be organized before 1872. It needed amendment to make it quite safe to organize new banks long after 1872. But to amend that section, the granting clause of the act, would be to let go of the hold upon the old constitution. It was therefore let alone; the promoters of the measure evidently preferring to take the chances of the question being raised. All this can be read between the lines of this remarkable attempt to rehabilitate a law that by its own provisions had been moribund for several years, and stamped obsolete in the statute books. Instead of writing a new act like the one just submitted (1877) to the people, under the belief that that was necessary, the old act was dealt with so as to avoid submission. The manifest purpose was to allow the incorporation of banks with the same full powers as those under the savings and loan act, but free from suspicion of unconstitutionality.

Meanwhile the question was in the courts. The case of Dearborn v. Northwestern Savings Bank, 42 O. S. 617, was decided in 1885. But the title of the case shows it was decided for the bank in the Common Pleas Court, as the defendant below was plaintiff in error in the District Court, where it was reserved. It is probable, therefore, that the question of the constitutionality of the savings and loan act was first decided in favor of the banks not long after the amendment of the free banking act in 1879.

The statistics show that but few banks were

organized under the amended act, but that commercial and savings banks were both formed freely under the savings and loan chapter of the general corporation act, the terms of which as already shown, permitted general banking.

The reason for two acts of substantially the same powers seems clear in the light of their history read from the statute books.

XXVII.

AN ILLUSTRATION OF GROSS INEQUALITY.

"Sec. 3817. Every banking institution, or corporation engaged in the business of banking in this state, shall make not less than two reports each year to the auditor of state as provided for in the next section showing the condition thereof at the close of business on any past day specified by said auditor of state; but institutions known as building and loan associations, organized and conducted under the statutes for such institutions and not doing a banking business shall not be required to make such reports."

Six of the indictments against Bachtel charge that in reports called for by the above section "false entries" were made. Three of the indictments refer to one report, charging in each a different item in the same report as being falsely made. It is claimed that these entries fall within the terms of section 30.

Section 3817 is very broad in its terms and all incorporated banking concerns, including savings banks, trust companies, etc., are held to make these reports.

As to all officers who do not fall within the terms of section 30, their conduct in respect to the making of these reports can be investigated in the criminal courts solely by an indictment under the perjury statute. Of course there can be but one indictment in respect of one report, no matter how many entries are complained of. As to one of Bachtel's reports three indictments are preferred charging offenses, and there is no reason why he could not have been also indicted under the perjury statute for swearing to the report.

It is claimed that he can be tried and if convicted punished three times for the false entries, and possibly again for the oath. Is this equality before the law?

Ho Ah Kow v. Noonan. 12 Federal Cases 252. "The term 'as guaranteed to every person by the federal constitution' implies not only that the courts of the country should be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but no charges or burdens should be levied on him which are not equally borne by others, and *that in the administration of the criminal laws, he shall suffer for his offenses no greater or different punishment.*"

XXVIII.

NO SPECIAL GROUNDS FOR CLASSIFICATION.

We submit that no reasonable grounds exist for classification of the officers, clerks and agents of the Ohio banks.

None of these banks is a fiscal agent of the state. None has any special relations to the community by virtue of any powers granted in the acts under review. The officers, clerks and agents of one set of banks owe no more to the community or the state than those of the other set.

It is to be noticed that the learned judges of the circuit court do not pretend to find any ground for classification. (Rec. 447, p. 24.)

XXIX.

THE GRANT OF CORPORATE POWERS FURNISHES NO GROUND FOR CLASSIFICATION.

As between banks under the savings and loan act and those under the free banking act all being incorporated there is no ground for discrimination. But there is none between the incorporated and unincorporated banks.

Johnson v. Mining Company, 127 California 4, (Involving a law establishing liens upon all the property of the corporation for wages of employes). Corporations cannot be made the basis of classification for purposes of legislation unless such classification is founded upon some constitutional or natural distinction, which suggests a reason to justify the diversity of legislation representing them.

The incorporated banks have acquired no powers or privileges in respect to banking not possessed by private citizens.

Banking, outside of the issue of circulation, is not a franchise.

Exchange Bank v. Hines, 3 O. S. 1—31.

State v. Scougal, 3 S. Dakota 55.

XXX.

SECTION 30 IS NOT A MERE POLICE REGULATION.

The provisions of this section do not regulate anything or any one. They define no duties, prescribe not a single rule of action; nor does it contain mere penal sanctions of regulations found in other sections of the act. It cannot be said, therefore, that it is a mere police regulation as to which the legislature must be allowed a certain discretion as to the order and extent of its exercise of the regulating power.

This section deals with primary rights and duties as to which regulations are not necessary. It is a criminal law as distinguished from regulation. It is not dealing with a course of conduct that may be right and lawful until declared to be unlawful, — *malum prohibitum*, but it deals with matters *mala in se*. It is simply a human enforcement of the laws of God. The two commandments, "Thou shalt not steal," and "Thou shalt not bear false witness against thy neighbor," comprehend the entire scope and all the elements of this section.

This is a criminal law. The difference between a mere police regulation and a criminal law is that in one the act prohibited is wrong because it is forbid-

den, in a criminal law properly considered the act is wrong before it is forbidden.

Ex parte Falke, 42 O. S. 638.
Marmet v. State, 45 O. S. 63.

Being a criminal statute, dealing with acts wrong in themselves and not merely made so by law, and having denounced certain acts, it must bring within the denunciation all who commit those acts.

It must be remembered the law is not dealing with a corporation, nor its acts. The differences between corporations and their powers are really foreign to the question. The section is dealing with the acts of men; which acts take their color and character not from the company for whom they act, not whether such company is incorporated or unincorporated, *but from the character of the business that is entrusted to their official care.*

Judged from this point of view what persons come within the denunciation of this statute? Obviously all who are called upon to act under substantially similar conditions and circumstances.

If then, this section 30 *brings within its operations only a part of those who do the acts denounced, it deprives those brought within its penalties of their equal rights before the law.*

XXXI.

THE SUPPOSED CLASSIFICATION WAS ACCIDENTAL.

We submit that no one can contemplate the history of this bank legislation and conclude that the legislature actually conceived the design of classifying the banks of the state for the purposes of criminal legislation.

The task in hand when this old law was amended was to get rid of its paper money features. The law was then practically dead, both by limitation and by virtue of the government tax. The purpose manifested in every line of the amending act of 1879 is to continue the act of 1851 in force without adding anything to the statute, and thus avoid submission to the people. Section 30 was lightly touched by striking out the reference to circulation and reducing the minimum term of punishment.

The notion cannot be entertained that at that time, and in enacting that law, the legislature undertook to classify bank officers and agents for the purpose of criminal legislation. Not a bank then existed under the law of 1851; and of course there was not a bank official then upon which that law could take effect. But thirty odd banks had been organized under the law as it was passed in 1851. There is no reason to believe that there was anything in the history of those banks, or the conduct of their officials that would suggest classification, for this section 30 has never, so far as we know, been invoked before these cases; certainly there is

no reported case under it. In short no basis existed in knowledge or experience that would justify classification or enable it to be done understandingly.

On the contrary the history of this legislation shows that this discrimination was an accidental result of the evolution of this law from its ancient and obsolete source.

XXXII.

IF AMENDED SECTION 30 IS DECLARED UNCONSTITUTIONAL IS ORIGINAL SECTION 30 REVIVED?

It appears from the opinion of the Circuit Court that not only was this question answered in the affirmative, but it probably relieved that Court of any doubts that may have existed in their minds upon the main question.

But the answers to this contention are several and conclusive.

(a) The original section 30 applied only to the officials of banks organized before 1872, and their active operations were limited to that period and then to be wound up as hereinbefore shown. The legislature did not then contemplate this new series of banks, and certainly enacted no law that will bind them.

(b) The legislature in 1851 applied the criminal section to the officials of banks of issue. They certainly did not make it binding upon the banks not then contemplated, which came into existence long after the original act had spent its force and had

become obsolete, the new banks being of a different character from the old.

(c) The amended section, apparently in force at the times alleged in these indictments, prescribed a minimum penalty of one year, the original section, one of five years. If the amended section is expunged, by virtue of what power can the heavier penalty be enforced? The rule of substitution of an old repealing statute declared unconstitutional has no application to criminal law. In Ohio there are no common law crimes. The state must place on its statute books just what it intends to impose upon its citizens. No *ex post facto* revival of an ancient and repealed statute can be tolerated.

(d) No substitution of the old section is permissible under the fourteenth amendment.

The complaint of these defendants is not only that an unconstitutional law was enacted in 1879, or in 1851, but that in 1906 the State of Ohio proposes to prosecute them under an indictment under either of said laws.

The fourteenth amendment says no state shall make or *enforce* any law, etc. They are not so much concerned about its *making,* but protest against its enforcement. They object to being *deprived of liberty* or *property* without *due process of law* which means equal laws for all, or being *denied* the *equal protection of the laws.* The date of the law is immaterial; the date of the *enforcement,* of the *deprivation,* or of the *denial,* is more important.

In Kaukauna Water Company v. Canal Company, 142 U. S. 251, the law complained of was en-

acted in 1848, and the point was made that the fourteenth amendment, adopted July 21, 1868, did not affect it. This court, however, accepted the contention of the complainant that the acts done under the law being subsequent to the amendment, it controlled. It sounds like a travesty of justice to say that a law fifty years old, which has been a dead letter for the greater part of its nominal existence, and thereby escaped challenge, should now be enforced, whereas if it were passed at the last session of the assembly it would be held invalid.

XXXIII.

AS TO THE LAW OF JUDICIAL NOTICE.

The records disclose, strictly speaking, no evidence. The several constitutional questions were presented as questions of law to be decided in the light of the public facts which ought to be generally known throughout the state. Of these it was assumed the courts would take judicial notice.

See 7 Ency. of Evidence, p. 880, topic, Judicial Notice and cases cited.

Hunter v. Railway Company, 116 N. Y. 615, Brown, J., says:

"That notice may be taken of facts which are generally known, and, as the common knowledge of man ranges far and wide, so the doctrine embraces matters so curiously diverse as the rising of the sun; the status of the Isle of Cuba; the late Civil War; the contents of the Bible; the character of a camp

meeting; the height of the human frame; the fable of the frozen snake; the characteristics and construction of the ice cream freezer; the general use of the diamond stack or the straight stack spark arrester; the habits of those who shave — in fine, all things both great and small."

Brown v. Piper, 91 U. S. 37, 43.

The public facts above referred to related to the existence of different kinds of banks existing in the state, incorporated and unincorporated, and the general methods of conducting the banking business throughout the state.

Bank v. Hall, 83 N. Y. 338.

"Courts will take judicial notice of the general course of business in a community including the universal practice of banks."

While the number of banks existing under the several statutes was not important, we referred to the official statistics of the state so as to present the facts in a somewhat concrete form, and cited the annual reports of the Secretary and Auditor of State published by authority of law.

116 N. Y. 615.

"Courts may take judicial notice of facts which are a part of the general knowledge of the country and which are generally known and have been duly authenticated in repositories of facts open to all, and especially so of facts of official, scientific or historical character."

In presenting the cases to the State Supreme

Court, desiring to avoid reference to the numerous annual volumes of state statistics, we submitted a statement of the Secretary of State putting into convenient form the facts which have appeared in the reports of that office. The Court permitted it to be submitted and we now offer it here for the same purpose. (Record pp. 65-82, Case No. 446.) The Auditor of State's annual report of 1885 is referred to as showing the banks then making reports under section 3817 Ohio R. S. From these sources the numbers used in this brief are derived as to incorporated banks. The number of unincorporated banks in the state is taken from the Bankers' Directory in use by all bankers throughout the country.

These are not submitted as evidence, but as a proper means of presenting to the Court's mind what in theory of law is known by all courts.

State v. Main, 69 Conn. 123.

Brown v. Piper, 91 U. S. 37.

Com. v. Marzynski, 149 Mass. 68.

The absence of a finding as to these public facts in the State Court will not preclude their notice by this Court.

New York Indians v. United States, 170 U. S. 1.

"Documents emanating from the executive and legislative departments of the government may be judicially noticed on appeal, though they were not incorporated in the findings of the court below."

Respectfully submitted,

WM. A. LYNCH,

Of Counsel for Plaintiffs in Error.